BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	
the Interstate, Interexchange	)	CC Docket No. 96-61
Marketplace	)	
	)	
Implementation of Section 254(g)	)	
of the Communications Act	)	
of 1934, as amended	)	

To: The Commission

REPLY COMMENTS
OF
THE AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
C. Douglas Jarrett
Susan M. Hafeli
KELLER AND HECKMAN
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

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TABLE OF CONTENTS

SUMMARY

Nothing in the parties' initial comments undermines the Commission's tentative conclusions regarding the public interest benefits associated with mandatory detariffing of services offered by non-dominant interexchange carriers. Mandatory detariffing promotes competition in the long-distance market by eliminating the potential benchmarks that tariffs provide. Moreover, it contributes to an informed consumer base; rather than allowing carriers to hide behind tariffs, mandatory detariffing should lead to increased opportunities for interested consumers to obtain actual notice of rates, terms, and conditions. Mandatory detariffing also ensures that carriers remain bound by the contracts they negotiate.

Opposing parties have failed to demonstrate that the Commission lacks the authority to impose mandatory detariffing. In fact, the "permissive detariffing" these parties urge is nothing more than an attempt to shift the decision-making process from the Commission to the carriers; under this approach, it would be the carrier, not the Commission, that determines which services are tariffed and which are detariffed. This approach turns the regulatory regime on its head.

The Commission's proposal to eliminate the prohibition against non-dominant IXC bundling of customer premises equipment and interstate, interexchange service is another pro-competitive step. The concerns raised by opposing parties can be adequately addressed by two safeguards: (1) that carriers must offer unbundled interstate, interexchange services on a stand-alone, nondiscriminatory basis; and (2) that carriers must use public interfaces and give adequate public notice of any changes in those interfaces. These two safeguards ensure that the Commission strikes the appropriate balance between maximizing customer choice and preserving competition in the CPE market. These safeguards also ensure that the U.S. Government honors its commitments to service suppliers and others under international agreements.

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The American Petroleum Institute (API), by its attorneys, hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking (NPRM) released by the Federal Communications Commission (Commission) on March 25, 1996 in the above-referenced proceeding. API submitted Comments on April 19, 1996 addressing Section VI, Rate Averaging and Integration Requirements of the 1996 Act. On April 25, 1996 API submitted Comments supporting the Commission's tentative conclusions in Sections III and VIII, relating to mandatory detariffing and bundling of customer premises equipment, respectively.

I. The Commission Should Adhere To Its Mandatory Detariffing Proposal For Non-Dominant Interexchange Carriers.

A. The Commission's Tentative Conclusions Have Substantial Support

The Comments of carriers opposing detariffing are unprecedented in one conspicuous sense: rarely have more makeweight and transparent arguments been presented to support a regulatory anachronism.

Fundamentally, the carriers reject out-of-hand the Commission's underlying public interest concern that

> [W]ithout pricing and other material information available from the public tariffs of their rivals, non-dominant interexchange carriers are more likely to initiate price reductions and other competitive programs, . . . forbearing from requiring non-dominant carriers to file tariffs for interexchange services promotes competitive market conditions, and therefore is in the public interest.[1/]

The Commission's logic is corroborated in an article on long distance pricing published in the May, 1996 edition of Business Communications Review. See Attachment A. Without even reaching the issues of "tacit collusion" or "collaborative pricing," which API believes is unnecessary, the table depicts substantial parallels in pricing trends as gleaned from the carrier's tariffs. This study amply supports the Commission's tentative conclusion that

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[1/] NPRM at ¶ 31.

detariffing can promote competition in the long distance marketplace by eliminating the potential benchmarking effect of tariffs.

B. Other Arguments in Support of Tariffs Are Not Persuasive.

Numerous carriers and carrier representatives press the same strained arguments, such as those offered by the Competitive Telecommunications Association ("Comptel"), regarding the virtues of tariffs. Comptel argues tariffs are beneficial because tariffs:

(1) define the duties and obligations of the parties;[2/]

(2) promote uniformity and minimizes ad hoc modification that individual contract negotiations may permit; [3/]

(3) permit carriers to minimize the transaction costs associated with providing service; [4/] and,

(4) provide an important educational function for a carrier's sales force.[5/]

2/ Comments of Comptel at p. 9.

3/ Id. at p. 9.

4/ Id. at p. 10.

5/ Id. at p. 10.

- *Comptel is absolutely right that tariffs define the duties and obligations of the parties.* The problem is that the tariffs are drafted by the carriers for the carriers' benefit.

- *Comptel is correct that tariffs promote uniformity and minimize ad hoc modifications.* The uniformity in pricing is the precise practice the Commission is concerned with and seeking to redress through detariffing. Unfortunately, the often one-sided nature of the terms and conditions of tariffs should be modified to balance user and carrier interests and risks.

- *Comptel is probably correct that tariffs may reduce transaction costs.* The reality is that one-sided tariffs are not the only means of minimizing transaction costs. Standard purchase orders written in readable prose are more desireable.

Most companies, small as well as large, would prefer signing a commercially enforceable agreement as opposed to a purchase order which often includes language to the effect that:

> [T]he rates, terms and conditions governing the service ordered herein are subject to change at the carrier's discretion, and in the event of any conflict between this agreement and carrier's applicable tariffs on file with the Federal Communications Commission, which carrier may amend from

> time to time, the terms of the tariff are controlling.

Contrary to Comptel's arguments, detariffing will not dictate how carriers must conduct their business or that they must negotiate. Carriers would remain free to offer service agreements on a "take it or leave it" basis. However, full disclosure and enforceable agreements comport with generally accepted business practices in the United States.

- *Comptel is undoubtedly correct that tariffs provide an important educational function for a carrier's workforce.* The problem is that the consequences for users can be disastrous if the sales persons don't understand their carrier's tariffs. Because tariffs are so complex and impenetrable, users typically rely on carrier's representations regarding rates, termination liability and other critical terms and conditions. Sales persons can be as confused as users with regard to ever-changing pricing plans. Unfortunately, purchase orders are signed where a critical term and condition proves to be incorrect and the error is not apparent until sometime after service commences.

In these circumstances, carriers often invoke the filed rate doctrine, quote the correct or controlling tariff provision, and inform the customer that tariff provisions

will govern. The cases cited in API's Comments, while perhaps not the "tip of the iceberg," are representative of practices that occur within the marketplace.[6/] Quite simply, users urge the Commission to detariff so that carriers can no longer "hide behind their tariffs."

The argument advanced by many carriers that detariffing will impose undue administrative burdens on carriers is not credible. Customer premises equipment, computers, and, increasingly, local area networks are commonplace in many businesses, government agencies, educational institutions and other organizations. CPE is no longer regulated and is as ubiquitous as telephone service. Local area networks, which are sophisticated combinations of software and hardware, are also acquired pursuant to contacts. Simply because services have always been tariffed, it does not follow that detariffing is unworkable or unduly burdensome.

AT&T raises the related point that detariffing will reduce the speed by which carriers could implement price changes and add service features.[7/] This is both particularly telling and troubling. In the absence of rate regulation, the marketplace should dictate pricing charges

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[6/] The comments of other user groups echo the same concern. Comments of the Ad Hoc Telecommunications User Committee, p. 4, and Capital Cities/ABC, Inc., et. al., p. 4.

[7/] Comments of AT&T at p. 19.

and all customers should have the option of agreeing to a price increase. Perhaps unintentionally, AT&T is admitting that tariffs provide carriers with far more discretion to increase rates than in a detariffed market and that AT&T is unwilling to forego this leverage. As to price decreases, few customers would object to a clause in an agreement that all costs savings or rate reductions made by the carrier be flowed through to the customer. The same logic applies to new features. Value enhancing features or network upgrades will make a carrier's service more desirable and should lead to more business. New features will probably prove attractive, if in fact users find value in the changes, and market acceptance will follow. Thus, the value of tariffs is not apparent, contrary to AT&T's views.

C. Section 10 Gives The Commission Authority To Forbear On Either A Permissive Or Mandatory Basis.

A number of parties contend that the Commission lacks the authority to implement a mandatory detariffing proposal for the domestic services of non-dominant interexchange carriers. The arguments raised by these parties fail to pass scrutiny.

Certain parties assert that the Commission may not implement detariffing on a mandatory basis since it was not specifically authorized in the Telecommunications Act of

1996 (1996 Act).[8] The 1996 Act provides no guidance in this respect since it did not specifically refer to either mandatory or permissive detariffing. If these parties believe that the 1996 Act authorized the Commission to adopt a permissive detariffing proposal, then it must be authorized to adopted a mandatory detariffing proposal as well.

AT&T contends that the plain language of Section 10 of the 1996 Act gives the Commission the discretion to forbear, but does not give the Commission the authority to cancel tariffs or prohibit the filing of new tariffs. According to AT&T, "[n]othing" in the statutory language "could remotely be read to give the Commission the authority to prohibit carriers from filing tariffs when the carrier and its customers conclude that a tariff is the most efficient way to order their relationship."[9] Though at some level an appealing construction of the statutory language, AT&T's position would turn the regulatory scheme on its head. Essentially, this construction conceives of a regulatory regime in which the Commission is obligated to accept and enforce only those tariffs the carrier chooses to file.

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[8] Pub. L. No. 104-104, 110 Stat. 56 (February 8, 1996). See, for example, Casual Calling Commission; GTE at 4; MFS at 3.

[9] AT&T, at p. 10.

Thus, the Commission becomes - at the carrier's discretion - the carrier's enforcement mechanism.

The Commission proposal is entirely consistent with the authority granted under Section 10. The Commission has made the determinations required by subsection (a).[10/] Consequently, the Commission has tentatively concluded that it must forbear from applying Section 203 of the Act to "nondominant interexchange carriers for domestic services."[11/] Consistent with subsection (a), it has identified both a specific "class of telecommunications carriers" and a specific "class of telecommunications services." Clearly, its proposal is framed within the confines of the express authority contained in Section 10.

In this first exercise of its express forbearance authority, the Commission has identified a subset from the universe of carriers subject to the Communications Act. In that respect, its approach is more akin to its prior efforts at permissive detariffing than the approaches taken by parties supporting "permissive" detariffing in this proceeding. Simply put, the Commission seeks to lift the Section 203 obligations for a group of carriers providing domestic services; the Commission intends to exclude certain

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10/ NPRM at ¶ 27.

11/ Id.

carriers from tariff filing obligations with respect to domestic services.[12/] Opposing parties, on the other hand, appear to define "permissive" so that the decision to detariff rests not with the Commission but with the carrier.[13/] Under this approach, it is the carrier itself that determines which services to tariff and which to exclude from tariffing requirements. Such a result is surely inconsistent with the policies enunciated in the 1996 Act.

The Commission's authority does not turn on whether it proposes to forbear on a permissive or mandatory basis. Rather, the key is that the 1996 Act expressly directs the Commission to forbear from applying any regulation or any provision of the Act when it makes the three-part determination required by Section 10(a)(1), (2), and (3), subject to the pro-competitive considerations specified in subsection (b). The Commission lacked such authority in its

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12/ See NPRM at ¶ 21, citing Second Report and Order, 91 FCC 2d 59 (applying permissive detariffing to resellers of terrestrial common carrier services); Fourth Report and Order, 95 FCC 2d 554 (applying permissive detariffing to all other resellers and specialized common carriers, including MCI and GTE Sprint); and Fifth Report and Order, 98 FCC 2d 1191 (applying permissive detariffing to domestic satellite carriers, miscellaneous common carriers, carriers providing domestic, interstate, and interexchange digital transmission services, and certain affiliates of exchange carriers offering interstate, interexchange services).

13/ See Comments of AT&T at p. 10; Frontier Corporation at p. 5; MCI at p. 3.

previous efforts to engage in both permissive and mandatory detariffing, as discussed in the NPRM.[14/] In Section 10, however, the Commission has "obtain[ed] the leave of Congress" that the United States Court of Appeal deemed necessary to Commission efforts to implement mandatory detariffing.[15/] No party has demonstrated otherwise. The Commission, therefore, is urged to adopt rules consistent with its tentative conclusion that forbearance from the tariff filing requirements of Section 203 should be implemented on a mandatory, rather than a permissive, basis.

D. Permissive Detariffing Is Not A Viable Policy.

Permissive detariffing is not a viable option. It does not address the fundamental problem associated with tariffs. Carriers can opt to file and amend tariffs as they see fit. The Commission's underlying concern over benchmark pricing will not be addressed. In fact, the Commissioner's policy objective will be undermined through a permissive tariffing scheme.

The Commission is also urged to reject AT&T's proposals that the filed rate doctrine can be skirted under a

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14/ NPRM at ¶¶ 21-25.

15/ MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1196 (D.C. Cir. 1985).

permissive detariffing scheme.[16] AT&T's suggestions will place the Commission, users, carriers and the courts in a quagmire of theoretical arguments as to the precedence of contracts over tariffs. AT&T's novel, untested theory pales in comparison to almost 100 years of court decisions in the United States in which the filed rate doctrine has been applied inflexibly holding that tariffs control and necessarily take precedence over contracts. The irony is that if AT&T is wrong, with regard to its novel legal theory, it wins; its "permissively filed" tariffs take precedence.

II. The Commission Should Resolve Transitional Issues.

A. International Services Should Be Detariffed Concurrently With Domestic Services.

The question of detariffing international services is not as significant as when the NPRM was adopted. The Commission has now found AT&T non-dominant with regard to international switched services.[17] Thus, the international offerings can be detariffed without disrupting the Commission's policies impacting international services. An intermediate position is to permit the inclusion of

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[16] See Comments of AT&T at p. 22.

[17] Motion of AT&T Corp. to be Declared Non-Dominant for International Service, Order, FCC 96-209 (rel. May 14, 1996).

international services in non-tariffed agreements involving multiple services, as suggested in Comments by API and others, but retain tariffing for "stand alone" international services.

B. Negotiated Arrangements Presently Tariffed Should Be Subject to Transitional Guidelines.

Detariffing should not be limited to new agreements or new services. API supports Ad Hoc's proposals with regard to those negotiated tariffs which are expressed as fixed discounts of "standard" tariff rates which the carrier may amend from time to time and the transition to a detariffed environment for negotiated service arrangements.[18/]

API would further suggest that one other guideline govern the negotiations between carriers and customers with regard to the "replacement pricing mechanism." Carriers should not be allowed to demand as a condition for such negotiations that the term of the existing (and presently tariffed) arrangement be extended. This will delay the transition to a detariffed environment. While some customers may be more than willing to extend the current term of their existing agreements, others may not. Carriers should be required to negotiate in "good faith" a replacement pricing mechanism and not have undue leverage to

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[18/] See, Comments of the Ad Hoc Telecommunication Users Committee at pp. 13-14.

extend existing agreements and thereby "lock-in" customers beyond the agreed-upon term.

C. Tariffs For Negotiated Service Arrangements And Other Multiyear Business Services Should Be Detariffed.

API urges the Commission to detariff negotiated service arrangements and all business services, except those services regularly used by small business users, so-called single-line customers, that extend beyond a single year.[19/] Multiyear commitments entail the greatest risk to users and are among the services most susceptible to benchmark pricing. See Attachment A.

This measured approach may provide the Commission an opportunity to assess the mechanics and issues that arise in connection with the detariffing process and allow carriers an opportunity to adjust internal procedures for dealing in a detariffed environment.

19/ This proposal is consistent with the approach advocated by MCI. See Comments of MCI Telecommunications Corporation at p. 3.

III. Safeguards Will Ensure That The CPE Market Remains Competitive After The Bundling Prohibition Is Lifted.

A. With Stand-Alone Offerings, Consumers May Purchase Only The Services And Equipment They Want.

Non-dominant interexchange carriers offering bundled packages of customer premises equipment (CPE) and interstate, interexchange services should be required to continue to separately offer unbundled interstate, interexchange services on a nondiscriminatory basis.[20/] Additionally, as noted by a number of commentors, the carriers should be required to use public interfaces for their services and to give adequate public notice of any changes in those interfaces.[21/] These safeguards adequately addresses the concerns raised by parties opposed to the Commission's tentative conclusion to amend Section 64.702(e) of the Commission's rules to allow non-dominant interexchange carriers to bundle CPE with interstate, interexchange services.

[20/] NPRM at ¶ 89. Parties endorsing this approach include Ad Hoc Telecommunications Users Committee et. al., GTE, LDDS WorldCom, MCI Telecommunications Corporation (on a trial basis), the NYNEX Telephone Companies, Pacific Telesis Group, Sprint, Telecommunications Resellers Association, U.S. West, Inc., and the United States Telephone Association.

[21/] Parties endorsing this safeguard include the Ad Hoc Telecommunications Users Committee et. al., the NYNEX Telephone Companies, and U.S. West Inc.

The Independent Data Communications Manufacturers Association (IDCMA), for example, raised a number of arguments in opposition to the Commission's tentative conclusion. Those comments reflect the concern that the provision of common carrier transmission services would be conditioned on the purchase of carrier-provided CPE. In IDCMA's view, "[i]f the Commission were to adopt the rebundling proposal contained in the Notice, interexchange carriers would be able to require transmission service customers to use carrier-provided CPE."[22/] In other words, "[t]he proposal . . . would allow interexchange carriers to require their basic service customers to purchase carrier-provided customer premises equipment"[23/] and would "allow interexchange carriers to deny end-users the right to interconnect competitively-provided CPE."[24/]

The Commission's proposal does not require bundling. Rather, it allows non-dominant interexchange carriers to bundle CPE with basic transmission services. With the safeguard of a stand-alone offering, customers that do not wish to purchase carrier-provided CPE are assured of their ability to obtain transmission services only. Thus, IDCMA's

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22/ Comments of IDCMA at p. 17 (emphasis in original).

23/ Id. at p. 33.

24/ Id. at p. 30.

concerns should be largely alleviated, as should similar concerns raised by parties such as the Consumer Electronics Retailers Coalition (the Coalition) and the Information Technology Association of American (ITAA).

Opposing parties acknowledge that the Commission has proposed a safeguard that should work to ensure that the CPE market remains competitive.[25] Nonetheless, they fear that the safeguard will fail "in practice," with the result that consumers will "be[] forced to choose among packages, none of which represents their ideal."[26] This ultimately paternalistic argument is predicated on erroneous assumptions, including (1) below-cost provision of CPE by a carrier;[27] and (2) that some fairly minimal level of cost savings would be sufficient to induce customers - including those with complex and critical telecommunications requirements - to accept a bundled offering "even if it was not the equipment that best met their needs."[28]

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[25] Comments of IDCMA at p. 41 (emphasis omitted).

[26] Id. at pp. 41-42; Comments of ITAA at p. 6.

[27] See Comments of ITAA at p. 4 ["To obtain new customers, carriers will offer CPE at discounts, at a loss, or even for free."]

[28] Comments of IDCMA at p. 41. IDCMA contends that interexchange transmission service constitutes the "lion's share" of a bundled offering.

Over the last fifteen years, consumers have grown accustomed to competitive choices in telecommunications equipment and service. Developments in these markets have been driven largely by demands imposed by end-users. It is unreasonable to expect that these same consumers would be willing to meekly accept an unsatisfactory bundled offering when competitive alternatives exist. The Commission's proposed safeguard of a stand-alone offering ensures that these consumers can seek and obtain such alternatives. That safeguard, in conjunction with public interfaces, "strike[s] an appropriate balance between the policy goals of maximizing customer choice and preserving competition in the CPE market."[29/]

B. The Proposed Safeguard Ensures That The Commission's Rules Are Consistent With International Obligations.

As the Commission notes, the U.S. Government has committed in the Uruguay Round Agreements on Tariffs and Trade (GATT) "to ensure, among other things, that 'service suppliers' are permitted 'to purchase or lease and attach terminal or other equipment which interfaces with the [public telecommunications transport] network and which is

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29/ Comments of Ad Hoc Telecommunications Users Committee et al, at p. 13.

necessary to supply a supplier's service. . . .'."[30] The U.S. Government has made a similar, through broader, commitment in the North American Free Trade Agreement.[31] Requiring non-dominant interexchange carriers to offer their services on a nondiscriminatory stand-alone basis ensures that the U.S. Government honors both the spirit and letter of these commitments.

As ITAA recognizes, "[e]ven if not required to do so by the Commission, carriers will continue to offer service unbundled from CPE rather than exclude themselves from that market segment."[32] Nonetheless, an explicit requirement that these carriers offer service on a stand-alone basis eliminates any argument that the Commission's tentative conclusion would allow interexchange carriers to deny service suppliers or others the right to "purchase or lease and attach" terminal or other equipment that interfaces with the public telecommunications transport network. The position would be further strengthened by requiring that carriers use public interfaces and give public notice of any changes in those interfaces.

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[30] NPRM at ¶ 89.

[31] North American Free Trade Agreement, H.R. Treaty Doc. No. 159, art. 1302(2)(a) 103d Cong., 1st. Sess. (1993) (NAFTA).

[32] Comments of ITAA at 5.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum respectfully urges the Federal Communications Commission to adopt its proposals to: (1) adopt a mandatory detariffing policy for the non-dominant interexchange carriers' multiyear service offerings; and (2) eliminate the prohibition against non-dominant interexchange carrier bundling of customer premises equipment and interexchange services.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE

By: C. Douglas Jarrett

Wayne V. ~~Black~~
C. Douglas Jarrett
Susan M. Hafeli
Brian Turner Ashby
KELLER AND HECKMAN
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: May 24, 1996

CERTIFICATE OF SERVICE

I, Cassandra L. Hall, a secretary in the law firm of Keller and Heckman, hereby certify that a copy of the foregoing was served by hand-delivery on this 24th day of May, 1996, to the following:

James D. Schlichting, Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

Jane Jackson
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

David Sieradzki
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

Competitive Pricing Division
Common Carrier Bureau
Room 518
1919 M Street, N.W.
Washington, D.C. 20554
(2 copies)

International Transcription Services, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Cassandra L. Hall